

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re: INCRETIN-BASED THERAPIES
PRODUCTS LIABILITY LITIGATION

Case No. 3:13-md-02452-AJB-MDD

Deposition Protocol

Judge: Hon. Anthony J. Battaglia
Magistrate: Hon. Mitchell D. Dembin

**PRETRIAL ORDER NO. __
DEPOSITION PROTOCOL**

This Order applies to all cases in this MDL, and to all counsel and law firms that have appeared in this MDL. In any deposition that is cross-noticed between this MDL and any other jurisdiction, counsel and law firms that have appeared in this MDL shall be bound by this Order throughout the deposition.

I. GENERAL PROVISIONS

A. Lead Deposition Counsel

Depositions and matters related to depositions shall be coordinated by a Lead Deposition Counsel for plaintiffs and Lead Deposition Counsel for defendants. Lead Deposition Counsel for plaintiffs shall be Michael Johnson or his designee.

Lead Deposition Counsel for defendants shall be Richard Goetz or his designee for Amylin Pharmaceuticals, LLC (“Amylin”), Nina Gussack or her designee for Eli Lilly and Company (“Lilly”), Doug Marvin or his designee for Merck Sharp & Dohme Corp. (“Merck”), and Loren Brown or his designee for Novo Nordisk, Inc. (“Novo”). The name and contact information for any designee shall be promptly communicated to the other parties.

B. Deposition Notices

1. *Notice of Deposition Procedures.* A copy of this Order shall be attached to each non-party subpoena issued or served in these MDL proceedings.

2. *Contents of Notice.* All deposition notices shall comply with the requirements of Fed. R. Civ. P. 30(b), and where the deposition is cross-noticed in another jurisdiction that cross notice shall comply with the requirement of that jurisdiction.

C. Cooperation

Counsel are expected to cooperate with and be courteous to each other and deponents in both scheduling and conducting depositions.

D. Attendance

1. *Who May Be Present.* Unless otherwise ordered under Fed. R. Civ. P.26(c) and subject to the terms of the Protective Order, depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party, court reporters, videographers, the deponent, and counsel for the deponent. Under no circumstances shall a person attend the deposition in any manner remotely without being identified, this shall include by telephone, internet link up of any kind or remote access communication.

2. *Unnecessary Attendance.* Unnecessary attendance by counsel is discouraged. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel should elect not to attend. No attorney who attends, participates in or uses a deposition in these proceedings shall be entitled or subject to any assessment, fee or tax merely by reason of such attendance, participation or use.

3. *Notice of Intent to Attend a Deposition.* In order for counsel to make arrangements for adequate deposition space, counsel who intends to attend a deposition noticed in this MDL should advise Lead Deposition Counsel for plaintiffs and defendants not fewer than three (3) business days prior to the deposition, whenever feasible. The notification should include the names of all attendees appearing at the deposition.

II. CONDUCT OF DEPOSITIONS

A. Examination

Questioning should ordinarily be conducted by no more than two attorneys for all plaintiffs. Once the witness has fully answered a question, that same question or substantially the same question shall not be asked again. Five (5) business days before the date of the deposition Lead Deposition Counsel for the noticing party shall give Lead Deposition Counsel for the other side notice of the identity of the attorney(s) who may examine the deponent.

Counsel should cooperate in the allocation of time in order to comply with the time limits set by the Court.

1. *Production of Documents.* Third-party witnesses subpoenaed to produce documents shall, to the extent possible, be served with the document subpoena at least thirty (30) calendar days before a scheduled deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the examination commences.

2. *Copies.* Extra copies of documents about which deposing counsel expects to examine a deponent should be provided to primary counsel for the parties and the deponent during the course of the deposition.

3. *Objections to Documents.* Objections to the relevance or admissibility of documents used as deposition exhibits are not waived, and are reserved for later ruling by the Court or by the trial judge. All parties shall cooperate as necessary so that the Court may issue a ruling on any objection to a document prior to trial or prior to any remand of cases for trial in the transferor courts.

B. Duration [DISPUTED]

1. Defendants' Position

Counsel should consult prior to a deposition to agree upon the time required to depose a particular witness. Counsel are encouraged to limit the length of depositions wherever practicable to no more than seven (7) hours, as provided by Rule 30 (d)(1) of the Federal Rules of Civil Procedure. In the event either party anticipates any deposition to exceed seven (7) hours, such party shall notify opposing counsel no less than three (3) weeks prior to the deposition. If the parties are unable to agree on the length for a particular deposition, the dispute shall be submitted promptly to Magistrate Judge Dembin for resolution in advance of the scheduled deposition. Counsel should cooperate so that examinations by multiple attorneys do not result in a deposition exceeding the allotted time.

2. Plaintiffs' Position

Plaintiffs shall have up to two (2) days of seven (7) hours to complete each deposition without regard to whether the deposition has been cross-noticed.

C. Deposition Day

Subject to the time limits set forth above it is anticipated that a deposition day typically shall commence at 9:00 a.m. and last typically no more than eight and one-half (8.5) hours, including lunch and breaks. There shall be one fifteen (15) minute morning break and two fifteen (15) minute afternoon breaks, with one (1) hour for lunch. Variations in this schedule

may be made by agreement of counsel who noticed the deposition and counsel for the deponent. Nothing herein shall prevent a witness from requesting a break at any time except while a question is pending, nor prevent any counsel from requesting a short break for personal reasons.

D. Scheduling

Absent extraordinary circumstances, counsel should consult in advance with opposing counsel and counsel for proposed deponents in an effort to schedule depositions at mutually convenient times and locations. Counsel are expected to cooperate and coordinate the scheduling of depositions. After counsel have arrived on a mutually acceptable date and location for a deposition, each side, including other defendants, shall be notified of the scheduled deposition at least ten (10) days in advance.

E. Location for Depositions

1. Unless otherwise agreed, depositions of plaintiffs will take place in each plaintiff's home district.

2. Unless otherwise agreed by the parties prior to the noticing of an expert deposition, the deposition of an expert witness shall take place in the expert witness' home district.

3. To the extent reasonably possible, depositions of current and former employees of each defendant shall take place as determined by each defendant.

F. Coordination with State Court Actions, Cross Noticing and Avoidance of Duplicative Depositions

1. *Coordination with State Court Actions.* In order to avoid duplicative discovery, minimize the number of times that a witness shall appear for a deposition, and to prevent the unnecessary expenditure of judicial resources and the resources of parties, counsel

for plaintiffs in the MDL shall use their best efforts to coordinate the scheduling of depositions with counsel for state court plaintiffs. In a coordinated deposition, this Court expects counsel for plaintiffs in the MDL and counsel for state court plaintiffs to cooperate in selecting the primary examiners described in section II.A., above. Regardless of which counsel conducts the initial examination of the deponent, subsequent questioning shall not be redundant or repetitive, although clarification of prior testimony may be sought if reasonably calculated to elicit testimony that adds to the substance of prior testimony.

2. *Cross-Noticing.* Any deposition in this MDL may be cross-noticed by any party in any Byetta, Januvia, Janumet, or Victoza-related action pending in state court, and any deposition in any Byetta, Januvia, Janumet, or Victoza -related action pending in state court may be cross-noticed by any party in this MDL. Each deposition notice shall include the information described in section I.B.2., supra. If a state court deposition has been cross-noticed in this MDL, then state court plaintiffs represented by counsel with actions filed in this MDL may not take a subsequent deposition of that witness except for good cause shown as determined by Magistrate Judge Dembin and, in that case, any subsequent deposition shall be restricted to such additional inquiry permitted by Magistrate Judge Dembin.

3. *Depositions Taken in Other Proceedings.* **[DISPUTED – Plaintiffs would omit entirely]** Defendants shall advise plaintiffs’ Lead Deposition Counsel of all depositions that have been taken by plaintiffs in other Byetta, Januvia, Janumet, or Victoza -related proceedings (other than depositions of case-specific witnesses) and shall assist in arranging for the plaintiffs’ Lead Deposition Counsel to obtain copies of transcripts of those depositions. Counsel for plaintiffs in this MDL proceeding shall not, without good cause, subject the witness to examination that is duplicative of questioning from the witness’ prior deposition.

4. *Successive Depositions in this Proceeding.* **[DISPUTED]**

a. **Defendants Position**

Absent good cause, unless otherwise agreed-to by the parties, no witness should be deposed more than once in this proceeding.

b. **Plaintiffs' Position**

Absent good cause, no witness should be deposed more than once in this proceeding. However, where a party elects to produce a witness pursuant to FRCP 30b(6) and the other party wishes to take that same witness' deposition as a fact witness in this litigation then this provision shall not apply under those circumstances.

G. Early Depositions

Subject to any other order regarding *in extremis situations* if the parties become aware of persons who possess relevant information but who by reason of age or ill health may become unavailable for deposition, the deposition may be taken as soon as practicable in accordance with the terms and conditions agreed-to by the parties or ordered by the Court.

H. Objections and Directions Not to Answer

1. Counsel shall comply with the FRCP and Local Rules regarding any objection made at a deposition shall be deemed to have been made on behalf of all other parties. All objections, except those as to form and privilege, are reserved until trial or other use of the depositions.

2. Counsel shall refrain from engaging in colloquy during deposition. The phrase "objection as to form" or similar language in accordance with applicable law shall be sufficient to preserve all objections as to form until the deposition is sought to be used. If requested, the objecting party shall provide a sufficient explanation for the objection to allow the deposing party to rephrase the question. For depositions cross-noticed with any state-court

proceeding, nothing in this paragraph prohibits counsel for parties to the state-court proceeding from specifying the bases for objections to the form of questions if and to the extent required under the relevant state's law. No speaking objections are allowed and professionalism is to be maintained by all counsel at all times. Counsel shall not make objections or statements which might suggest an answer to a witness.

I. Telephonic Depositions and Participation

By indicating in its notice of deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Fed. R. Civ. P. 30(b)(4). Unless an objection is filed and served within ten (10) calendar days after such notice is received, Magistrate Judge Dembin shall be deemed to have granted the motion. Non-examining counsel may attend depositions telephonically but are not permitted to participate absent extenuating circumstances, such as weather delay or physical restriction on travel.

J. Disputes During Depositions

Disputes between the parties should be addressed to this Court rather than the District Court in the District in which the deposition is being conducted.

Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to the Magistrate Judge Dembin by telephone (619-446-3972). If the Magistrate Judge is not available, or to the extent the parties are still unable to resolve the dispute, the deposition shall continue with full reservation of rights for a ruling at the earliest possible time.

If the nature of the dispute would not stop the deposition from going forward, the parties may elect to either present the matter to Magistrate Judge Dembin by telephone, or to present the

dispute to Magistrate Judge Dembin in writing. Magistrate Judge Dembin will issue a prompt ruling, as his schedule permits.

In the event Magistrate Judge Dembin is unavailable by telephone to resolve disputes arising during the course of the deposition, the deposition shall nevertheless continue to be taken as to matters not in dispute. Nothing in this Order shall deny counsel the right to 1) suspend a deposition pursuant to Fed. R. Civ. P. 30(d)(3); 2) file an appropriate motion with Magistrate Judge Dembin after the deposition, and appear personally before Magistrate Judge Dembin, or 3) file a motion to prevent any decision or recommendation of Magistrate Judge Dembin from taking effect as may be otherwise permitted.

K. Video Depositions

By so indicating in its notice of a deposition, a party, at its expense, may record a deposition by videotape or digitally-recorded video pursuant to Fed. R. Civ. P. 30(b)(3) subject to the following rules:

1. *Real-time Feed.* All video depositions will be stenographically recorded by a court reporter with “real-time feed” transcription capabilities if available.
2. *Video Operator.* The operator(s) of the video recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.
3. *Attendance.* Each witness, attorney and other person attending the deposition shall be identified on the record at the commencement of the deposition. Under no circumstances shall a person attend the deposition in any manner remotely without being identified, this shall include by telephone, internet link up of any kind or remote access communication.

4. *Standards.* Unless physically incapacitated, the deponent and examiner shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be videotaped against a solid background with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting and field of view shall be non-obtrusive to the deponent, and will be changed only as necessary to record accurately the natural body movements of the deponent. Only the deponent and any exhibits or demonstrative aids used in the examination will be video recorded. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. The witness shall appear in ordinary business attire (as opposed to, for instance, a lab coat) and without objects such as a Bible, medical equipment, or other props, except to the extent that the prop is used as an aide in order to demonstrate and/or explain the witness' testimony.

5. *Filing.* The operator shall preserve custody of the original video medium (tape or DVD) in its original condition until further order of the Court.

6. *Interruptions.* No attorney or party shall direct instructions to the video operator as to the method of operating the equipment. The video camera operation will be suspended during the deposition only upon stipulation by counsel and "off the record" discussions.

7. *Other Recording.* No one shall use any form of recording device during the course of a deposition other than the designated videographer or court reporter. This shall include any form of remote transmitting device, computer recording device, laptop cameras or personal data devices including smart phones, tablets, iPads, Androids, iPhones, Blackberry, or other PDA. Any person caught violating this provision shall be immediately identified and

reported to the Court for the possible imposition of sanctions. This shall not preclude the taking and transmission of notes by or to those identified on the record.

L. Correction and Signing Depositions

Unless waived by the deponent, the transcript of a deposition shall be submitted to the deponent for correction and signature within thirty (30) days after the end of the deposition. The deposition may be signed by the deponent before any notary within thirty (30) days after the transcript is submitted to the deponent. If no corrections are made during this time, the transcript will be presumed accurate.

M. Cost of Deposition

The noticing party shall bear the initial expense of both videotaping and stenographic recording. The parties shall pay for their own copies of transcripts and videotapes of depositions.

III. FEDERAL RULES OF CIVIL PROCEDURE APPLICABLE

Unless specifically modified herein, nothing in this order shall be construed to abrogate the Federal Rules of Civil Procedure or the Local Rules of this Court.

DONE and ORDERED this __th day of ____, 2013.

BY THE COURT:

/s/

Hon. Mitchell D. Dembin